JAN 2 2002

No. 01-809

IN THE

Supreme Court of the United States

LEAH E. McKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF WASHINGTON, DIVISION ONE

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Mutual of Enumclaw Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

The petitioner has not stated an adequate reason which would warrant consideration of his petition by the Supreme Court. The petitioner's constitutional claims are without merit and the sole basis for this petition and appeal is that the petitioner failed to request that the arbitration proceedings be recorded.

According to Rule 10 of the Rules of the Supreme Court of the United States, a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The petitioner has no grounds to appeal a binding UIM award. Therefore, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Mutual of Enumclaw issued underinsured motorist (UIM) coverage to the driver of a vehicle the plaintiff was riding in when a car accident occurred. Under that policy, Mutual of Enumclaw promised to pay whatever damages the plaintiff is legally entitled to recover from the owner or operator of an underinsured motor vehicle.[1]

The plaintiff claimed such damages. CP 176- 177. But the parties could not agree as to the amount of damages the plaintiff was legally entitled to recover. Consequently, the parties arbitrated that question pursuant to the policy's arbitration clause, which states as follows:

> 1. If we and a covered person disagree whether that person is legally entitled to recover damages from

1. The UIM coverage is subject to conditions, limits and restrictions, none of which are at issue in this case.

> the owner or operator of any underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. We will pay the expense of the arbitration. However, attorney's fees and all other fees including, but not limited to, fees paid to medical and other expert or non-expert witnesses will not be considered arbitration expenses and are to be paid by the party incurring them.
>
> 2. Unless both parties agree otherwise, arbitration will take place in the county and state in which the covered person lived. **A decision agreed to by two of the arbitrators will be binding.**

CP 229 (some emphasis deleted, other emphasis added).

The plaintiff's attorney appointed Steve Adelstein as his arbitrator and Mutual of Enumclaw appointed Barry Johnson as their arbitrator. Mr. Adelstein and Mr. Johnson agreed to appoint Larry Levy as the third arbitrator. CP 220.

With the agreement of all parties, the arbitration hearing was scheduled for June 18, 1999. Both parties presented evidence, including the testimony of one of claimant's health care providers. CP 220.

On June 18, 1999, the arbitrators rendered a unanimous verdict in the amount of $59,190.00. CP 231. The claimant's

attorney requested clarification of the award and on July 22, 1999 Larry Levy, indicated that the award of $59,190.00 included all damages. CP 234. This clarification was agreed to by all three arbitrators. CP 234. After that the plaintiff's attorney filed this lawsuit in an attempt to vacate the unanimous binding arbitration award.

The only ground for setting aside the award is that the arbitration proceedings were never recorded. *See pp. 9-10 of the appellant's opening brief.* But the plaintiff's attorney never requested the proceedings be recorded. CP 238: 17-21. Rather, the first time the plaintiff ever complained about that fact was not until after the arbitrators returned their award. *Id.*

In particular, the plaintiff claimed that since the arbitration proceedings were never recorded, the arbitration statute which allows arbitrations somehow violates the constitution. CP 197- 210 and CP 250- 260; *see also "IV B" and "IV C" of the appellant's opening brief.* But nothing precluded the plaintiff from recording the proceedings.

The defendant opposed the plaintiff's motion to vacate the arbitration award and moved for terms. CP 225. The court denied the plaintiff's motion and granted terms to the defendant in the sum of $500. CP 266- 267.

The petitioner then filed a notice of appeal with the Washington Court of Appeals. On February 12, 2001, the Court of Appeals affirmed the judgment denying petitioner's motion to vacate the arbitration proceedings. An order denying a petition for review was entered in the Supreme Court of Washington State on September 5, 2001.

ISSUES

1. The invited error doctrine precludes a party from claiming an error occurred below when that error was never objected to until after the result was obtained. *Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996); *Agranoff v. Morton*, 54 Wn. 2d 341, 346-347 (1959) (overruled on other grounds by CR 50 (b)). Since the plaintiff never requested the arbitration proceedings be recorded at any time before the award was rendered, can the award be vacated on that ground?

2. Whether the claimant can appeal a binding UIM arbitration award when the statutory grounds for an appeal have not been met?

3. Whether the claimant can bring a motion to vacate an arbitration award when the statutory grounds for vacating a binding UIM arbitration award have not been met?

ARGUMENT

A. If any "error in law" occurred at the arbitration hearing, it was "invited error" because the plaintiff's attorney never requested the arbitration proceedings be recorded.

The plaintiff's sole basis for this appeal is that since the arbitration proceedings were never recorded, an "error of law" occurred which requires vacation of the award. *See pp. 9-10 of the appellant's opening brief.* But the plaintiff's attorney never requested the proceedings be recorded. CP 238: 17-21. Rather, the first time the plaintiff ever complained about that fact was not until after the arbitrators returned their

award. *Id.* Having failed to have requested the proceedings be recorded at or before the arbitration, any error on that basis was waived under the invited error doctrine.

The invited error doctrine has been set out as follows:

> It is the duty of counsel for all parties to promptly call the court's attention to any error in the trial. Counsel may not secretly nurture an error, speculate upon a favorable verdict, and then, in the event it is adverse, bring forth the error as a life preserver on a motion for a new trial.
>
> . . .
>
> . . . The rule has been stated over and over again that a party may not remain silent and take his chance on a verdict and then, if it is adverse, complain of some inadequacy which could have been quite easily corrected . . .
>
> . . .
>
> Respondent's counsel made no request for a direction on the issue of liability. Had such a request been seasonably made, it would have been granted without objection. Had it been denied, respondent would have been in a position to urge it upon a motion for new trial and, if necessary, then upon appeal. But he may not remain silent when it is time to speak, and then urge it for the first time on a motion for a new trial.

Agranoff v. Morton, 54 Wn. 2d 341, 346-347 (1959) (overruled on other grounds by CR 50 (b)).

In *Sdorra v. Dickinson*, 80 Wn. App. 695, 701-2, 910 P.2d 1328 (1996), the court said:

> According to this rule, a court may vacate a verdict not supported by substantial evidence, even if the party seeking vacation failed to object before the case was submitted to the jury. See also CR 50(b). A court may also vacate a verdict for error of law not involving a lack of substantial evidence, if the party seeking vacation objected at the time. But, by negative implication, a court may not vacate a verdict for error of law not involving a lack of substantial evidence, if the party seeking vacation failed to object or, a fortiori, invited the error. ***Cerjance v. Kehres***, 26 Wn. App. 436, 439, 613 P.2d 192 (1980).
>
> In passing, we observe that cases from other jurisdictions are split on whether a trial court has discretion to grant a new trial on the basis of invited error. For example, in ***Walter v. Simmons***, 169 Ariz. 229, 818 P. 214 (1991), a case in which the moving party had invited error by proposing an erroneous instruction, the appellate court said the trial court could correct the error "to prevent a miscarriage of justice." Other cases, however, hold to the contrary. Thus, in ***Burke v. Moyer***, 621 S.W.2d 75 (Mo. Ct. App. 1981), the trial court erroneously gave certain jury instructions that Moyer had proposed, and the jury returned a verdict for Burke. The trial court granted a new trial, and Burke appealed. Reversing the order for new trial, the appellate court said:
>
> > The instruction error . . . is not now available to Moyer as a basis to sustain

> the new trial order. [The instruction] was given by the trial court in the form tendered by Moyer and at no time prior to submission of the case did Moyer ever suggest that the definition instructions were erroneous.
>
> . . . A party cannot lead the court into error and then employ that error as a source of complaint.

Burke, 621 S.W.2d at 82. And in ***Schaffer v. Pulido***, 492 So. 2d 1157 (Fla. Dist. Ct. App. 1986), the trial court erroneously gave plaintiffs' proposed instruction 5b. After a defense verdict, the trial court granted a new trial due to instruction 5b. Reversing the order granting new trial, the appellate court stated:

> Without dispute, the plaintiffs submitted both jury instruction 5b, which the trial court gave, and the verdict form that was used in this case. This being so, the plaintiffs invited the error, if any, which occurred below and may not complain on a motion for new trial or on appeal concerning these alleged errors.

See also ***General Contractors of Am., Inc. v. Stinson***, 524 So. 2d 1148, 1151 (Fla. Dist. Ct. App. 1988) (parties "may not now secure the benefit of a new trial based upon an error which they invited"). In light of CR 59(a)(8), Washington is aligned with ***Burke***, ***Schaffer*** and ***Stinson***.

B. The plaintiff's constitutional challenges are frivolous.

Ostensibly, the plaintiff cites no cases involving insurance issues or interpreting the arbitration statute. The cases cited by the plaintiff stand for the proposition that criminal defendant's are entitled to have court proceedings recorded. Those same considerations do not apply to a contractual arbitration agreement, and no case says otherwise.

Moreover, nothing in RCW 7.04 *et seq.* nor in Mutual of Enumclaw's contract precludes the arbitration hearing from being recorded. Certainly, the plaintiff's attorney was free to do so, but did not. In fact, no request was ever made to record the proceedings and this matter was never made an issue until after the arbitrators returned their award. CP 238: 20-21.

C. Mutual of Enumclaw's policy clearly states that the UIM award is binding.

The claimant's right to make an underinsured motorist claim against Mutual of Enumclaw is based on the contract between Ms. Bisnett and Mutual of Enumclaw. The Mutual of Enumclaw insurance policy that was in effect at the time of the accident states the following regarding the procedure that is to be used when there is a disagreement regarding damages:

> 1. If we and a covered person disagree whether that person is legally entitled to recover damages from the owner or operator of any underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each

> party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days either may request that selection be made by a judge of a court having jurisdiction...
>
> 2. Unless both parties agree otherwise, arbitration will take place in the county and state in which the covered person lives. *A decision agreed to by two of the arbitrators will be binding.*

In the case at bar, all three arbitrators rendered an unanimous verdict. Therefore, according to the unambiguous language of the contract, the arbitration award is binding. The claimant does not have any right to appeal the award simply because she does not agree with it. Therefore, claimant's appeal of the arbitration award was properly dismissed.

Washington State has a strong public policy in upholding verdicts in binding arbitration cases. *Petersen v. United Servs. Auto*, 91 Wn. App. 212, 216 (1998). RCW 7.04 does not have any language regarding the right of a party to appeal the arbitration award, therefore, the claimant's appeal to the trial court was properly denied.

D. Claimant had no valid grounds to appeal the binding UIM arbitration award.

RCW 7.04.010 states the following regarding agreements to arbitrate disputes:

> Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy which

> may be the subject of an existing action between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

The statute clearly allows parties to agree to arbitrate their disputes. The UIM policy provision regarding arbitration is enforceable in Washington.

RCW 7.04.160 states that the an arbitration award will only be vacated if the following circumstances exist:

> (1) Where the award was procured by corruption, fraud or other undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators or any of them.
>
> (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

> (5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).
>
> An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.
>
> Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

In the case at bar, there is absolutely no evidence to suggest that the arbitrators engaged in behavior that is stated in subsections (1) through (4) of RCW 7.04.1160. In fact, the decision rendered by the panel was unanimous. The arbitrator that the claimant appointed even agreed with the arbitration award. Also, the claimant never requested a continuance and was able to present his entire case at the arbitration hearing. Therefore, RCW 7.04.160(3) does not even apply.

The arbitrators fully executed their duties in a competent manner and did not exceed their authority in rendering a verdict. The arbitrators were asked to decide the value of the claimant's UIM claim and this was the scope of their authority. The arbitrators rendered a decision regarding Ms. McKenzie's damages as a result of the April 14, 1995 motor vehicle accident after she had presented all her medical records and approximately six hours of testimony at the arbitration hearing. This included live testimony of Dr. Thomas DePuydt. Therefore, they did not exceed the scope of their authority.

All three arbitrators are experienced attorneys and there is no reason to suspect that they did not competently execute their duties as arbitrators. Absent such a showing, the claimant has no basis to vacate the arbitration award.

The scope of review when vacating an arbitration award is limited to the standards set forth in RCW 7.04.160. It is clear that the statute will only allow a court to vacate an arbitration award if the arbitrators exceeded their authority or the conduct of the arbitration panel rose to such a level that the moving party is able to establish "impropriety" or fraudulent conduct among the arbitrators.

CONCLUSION

For the foregoing reasons, the Supreme Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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